Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of The United States
October Term 1996

CHRISTINA LEAP AND PAUL SIPPLE, INDIVIDUALLY AND PAUL SIPPLE, EXECUTOR OF THE ESTATE OF MARTHA ROSE SIPPLE, DECEASED,
Petitioners,

v.

PAUL MALONE, ALLOY FABRICATORS, INC. AND F & K LEASING, INC.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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*RICHARD L. MASTERS
EARL C. MULLINS, JR.
MASTERS, MULLINS & ARRINGTON
1012 S. Fourth Street
Louisville, Kentucky 40202
(502) 582-2900
Counsel of Record

May 9, 1997

LEGAL ADVANTAGE * 432 Walnut St. * Cincinnati, OH 45202 * (800) 581-2252

QUESTIONS PRESENTED

1. The Case Involves Important Direct and Unresolved Conflicts With Decisions of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits Concerning the Conclusive Effect Of Expert Testimony in These Circumstances.

2. This Case Involves An Important, Direct & Unresolved Conflict With The Decision Of the United States Supreme Court in Bene vs. Jeantet, 129 U.S. 683, 32 L.Ed. 803, 9 S.Ct. 428 (1889).

3. The Panel Decision Disregards Sixth Circuit Precedent And Violates ***Stare Decisis***.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Christina Leap, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 23, 1996.

OPINIONS BELOW

On July 27, 1995, the United States District Court rendered its decision in which the Court entered a judgment on a jury verdict in favor of Plaintiff (Petitioner) in the amount of $754,677,83. A copy of the District Court's Opinion appears in the Appendix hereto. The opinion of the Court of Appeals also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 23, 1996. Subsequently on January 6, 1997, Petitioner filed a Petition for Rehearing with the Court of Appeals which was denied on February 10, 1997. This petition for certiorari was filed within ninety (90) days from the date the Petition for Rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a diversity case arising in tort for the recovery of monetary damages flowing from a tragic automobile/truck accident in Tennessee. The District Court granted judgment for the Plaintiff on a jury verdict of $754,677.83 which was comprised of $246,677.83 for past medical expenses; $275,000.00 for past pain and suffering; $133,000.00 for future pain and suffering; and $100,000.00 for loss of earning capacity.

The Appellant sought appellate relief to this Court because of the District Court's denial of its post trial Motion for a New Trial and/or for an Additur.

This Court of Appeals affirmed the decision of the Trial Court in a decision entered on December 23, 1996. This Appellant seeks rehearing on the matters cited herein.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On Thanksgiving Eve, November 23, 1992, Christina Leap, was a passenger in a small Dodge Automobile that was law-fully operating on a state highway in McMinn County, Tennessee. Paul Malone, the Defendant below, while driving a 65 foot tractor-trailer in

the opposite direction, made a left turn across the path of and directly in front of the Dodge automobile. The testimony at trial was that he negligently turned in front of the vehicle having either seen the vehicle and misjudged its speed and distance or looked but failed to see the on-coming vehicle was left with less than two (2) seconds to react.

One passenger was killed, and another badly injured and Christina Leap sustained massive injuries, the most serious of which was a severe closed head injury and bleeding of the brain with subsequent permanent scar tissue formation. She was in a coma for nearly 30 days and underwent four major operations during the course of her recovery.

Upon awakening from her coma, she had to be retaught all motor, functional and learned skills, including but not limited to, walking, speech and personal hygiene. She awoke from the coma with the skills of a newborn baby.

Over three years (now 4 years) and with the aid of necessary extensive tutoring and other forms of support, she has been able to resume a limited college curriculum.

At the accident scene, State Troopers' Jones and Yarber investigated. They completed a uniform Accident

Report and scribed into an appropriate portion of the report that they were citing the driver with criminal citation of "reckless endangerment". (In February of 1993, Trooper Yarber executed an Affidavit supporting a change in the citation given to Mr. Malone from criminal misdemeanor "reckless endangerment" to criminal felony "reckless endangerment".)

At trial, Trooper Yarber testified he believed Mr. Malone's conduct in negligently operating the truck, which killed one person and permanently disabled two others, was a violation of the standard of care but "accidental". Outside the presence of the jury, he testified that the conduct of Malone was not "reckless", even though he had pursued in the course of his job and based on his observations at the scene, a citation of criminal reckless endangerment against him. The Court below did not allow the testimony of the criminal reckless citation to go to the jury nor did it allow introduction of the Accident Report.

The Trial Court directed a verdict against the Appellant on the issue of punitive damages. At trial several experts, including Dr. Dennis Sprague (by video equipment) and Dr. Anthony Gamboa, testified on behalf of Tina Leap and, in expert terms, assessed the permanent nature of her injury. The uncontradicted evidence was that her 20% disability would interfere with all aspects of Tina's life.

The model of her return to school would become the model of her life, i.e., she could achieve certain limited levels of success so long as it involved limited schedules and extensive help and support. The return to a limited college curriculum with extensive tutoring was not exceptional but rather that which she would face all of her life in school, in work (if there was an employer who would be able to "tutor" her extensively, continuously) as well as in social venues. Tina would need extensive help all of her life because of the nature of her injury, a severe closed head trauma. Her successes are short-term and sustainable only where she has extensive assistance.

Dr. Gamboa testified that reduced to present value her wage loss, post-injury as compared to her pre-injury capabilities, if she became employable (which was in doubt) was $906,000.00. On the other hand, if she never was able to work again, her loss would be as much as $1.4 million dollars. The testimony was un-contradicted. The jury returned a verdict of $100,000.00 for future lost wages.

The Petitioner appealed the Judgment (C-1) of the District Court to the United States Court of Appeals for the Sixth Circuit which affirmed the decision (A-1) of the District Court (D-1). Subsequently, Petitioners moved for **Rehearing *En Banc***, or alternatively for Panel Hearing which was denied February 10, 1997 (B-1).

Rehearing *En Banc*, or alternatively for Panel Hearing which was denied February 10, 1997 (B-1).

REASONS FOR GRANTING THE WRIT

1. The Case Involves Important Direct and Unresolved Conflicts With Decisions of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits Concerning the Conclusive Effect of Expert Testimony in These Circumstances.

The decision of the Sixth Circuit Court of Appeals conflicts with the decision of the Tenth Circuit Court of Appeals in Stafos v. Missouri Pacific Railroad Company, et. al., 67 F.2d 314 (10th Cir. 1966). Both cases involve expert opinion testimony as to matters outside the competence of lay persons to determine and in each case there was no expert opinion testimony to the contrary. In both cases the testimony was unequivocal, uncontradicted and unimpeached on technical matters beyond the common experience of the lay person's determination and foundation. The Tenth Circuit found that where there was no scientific proof to the contrary, and where there is controlling, positive, uncontradicted and unimpeached evidence, it may not be disregarded even though adduced from interested witnesses and that in such circumstances the trier of fact is bound to honor it. See Stafos, supra, at p. 317. See also Potucek v. Cordeleria Lourds, 310 F.2d 527 (10 Cir. 1962).

contrary findings See Stafos, supra.

In Aetna Life Insurance Company v. Kelley, 70 F.2d 589 (8th Cir. 1934), the U.S. Court of Appeals for the Eighth Circuit held in circumstances such as this where uncontradicted expert testimony is of such great value it may have a weight approximately that of conclusiveness. Where the testimony of an expert witness concerns a subject calling for an expert opinion, it is conclusive to the extent that it may not be contradicted by the testimony of a non-expert witness. See Aetna Life Insurance Company v. Kelly, supra. Common knowledge may not be exercised as against uncontradicted testimony of an expert and when the common knowledge of the jury is of little or no use, then the expert opinion may be given controlling effect. See Aetna, supra. See also Security First National Bank of Los Angeles v. Lutz, 322 F.2d 348 (9th Cir., 1963) Fitts Estate v. C.I.R., 237 F.2d 729 (8th Cir. 1958)

The decision of the Sixth Circuit further directly conflicts with the decisions of other circuits finding that positive testimony uncontradicted by anyone, should control the decision of the court. Greenfeld v. C.I.R., 165 F.2d 318 (4th Cir. 1948); N.L.R.B. v. Ray Smith Transport, Co., 193 F.2d 142 (5th Cir. 1952); Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.2d 676 (2nd Cir. 1944).

But for the testimony of the hopes and dreams of Tina Leap that some day she would be a physical therapist, there was no competent evidence of a bright future for her as it regards her work life. The evidence was of a dismal future. Everyone from Tina's mother to the jury hoped that Tina could someday be permanently and meaningfully employed. The reality of all of the expert testimony which stands uncontradicted is that she will never work except in the same fashion as she goes to school (i.e. on a limited basis and only with a great deal of assistance). The jury, with regard to future income earning potential, returned a verdict based only on hope. In so doing, they completely disregarded the controlling, positive, uncontradicted and unimpeached expert testimony. They did not return a verdict based on the evidence at trial. Accordingly, the Sixth Circuit should have reversed the District Court granting either Additur or a new trial on this issue consistent with the decisions of other Circuits in such circumstances. The failure of the Sixth Circuit to do so creates significant inconsistency in the administration of justice in cases where expert testimony is required to introduce complex scientific and technical evidence yet under the aegis of the Sixth Circuit's reasoning in this case, the jury was permitted to substitute its judgment for that of the expert on matters where lay persons are not competent to make an independent judgment.

The cross-examination of Dr. Gamboa by the defense was not sufficient to create a range different from that which he gave on direct examination. In fact, no alternative sum or means of computing same was elicited from Dr. Gamboa. No where in the cross-examination of Dr. Gamboa was there a suggestion that any reduction in the dollar value, either by a specific number or a percentage to the range of recovery which Dr. Gamboa indicated, was proper during his direct testimony. There was no testimony that the foundation upon which he based his expert opinion (e.g. the 20% disability of the Petitioner post-accident as compared to the pre-accident and emotional issues which remain unresolved in the life of Petitioner, which would cause her to not be able to use her abilities or education) in any circumstance was incorrect. There was no rebuttal to the testimony of Tina's disabilities and no rebuttal to the range of economic loss.

If left undisturbed, the decision of the U.S. District Court, as affirmed by the Sixth Circuit, is an anomaly in the legal system the effect of which is to allow juries to disregard the only controlling evidence on a subject requiring expert opinion testimony (i.e. the complex economic calculation of reduction to present value) in order for jury to make a proper conclusion as to the fair and just amount of compensation to which Tina Leap is entitled. A non-expert witness cannot supply any competent admissible

testimony on such an issue and the defense in this case introduced no expert testimony or alternative theory from the only expert who testified about the future income loss of Tina Leap as the result of her devastating injuries. A jury is required to make an informed decision about matters which must come from expert testimony and where said testimony is uncontradicted and unimpeached, it must be controlling. See Stafos, supra, Aetna, supra, First National Bank of Los Angeles, supra. If rebuttal evidence is offered to the jury through an expert by the defendant as a basis of rejecting in whole or in part expert testimony offered by Plaintiff then the jury has a legitimate basis on which to make a decision. However, it is error to allow a recovery outside the range proffered by the only expert to testify. A few questions by defense counsel which do not in any manner or form suggest to the jury or give the jury a method of reducing by any range, percentage or specific amount that amount to which the expert has testified is no evidence at all and the jury is left to speculate on its own. This is impermissible and has created a significant issue in conflict among the circuits justifying review by the U.S. Supreme Court to promote consistency in the use of expert testimony by juries in such circumstances.

The decision of the Sixth Circuit allows the jury to speculate as to complex matters such as reduction to present value of future wage losses of an individual allowing them

to erroneously calculate, without any expert testimony to the contrary, an award to Tina Leap of only $100,000.00 for her lifetime of wage losses and economic incapacity. The $100,000.00 by the jury awarded in no way relates to the testimony of Dr. Anthony Gamboa, the Plaintiff's expert economist, given on direct or to the testimony of Dr. Gamboa given on cross-examination nor does it relate to the expert testimony of the professionals on which his opinion was based. The $100,000.00 amount awarded by the jury relates to nothing except the decision of the jury to disregard the testimony which it was given during the trial and to find a different amount without any technical foundation for their collective conclusion. The only range established by the evidence on the issues of lost wages was that of Dr. Gamboa, who testified that conservatively the Plaintiff's loss was $906,743.00 and pessimisticly $1,400,000.00. The Petitioner came to federal court simply requesting that a jury fairly review the evidence and make a determination in regard to the tragic accident which irrevocably changed her life. The jury speculated outside the evidence, contrary to the controlling, positive, uncontradicted and unimpeached evidence offered by the only expert who testified. It was established without contradiction that Ms. Leap has a major disability and no evidence was presented to the contrary. She has scar tissue on her brain and a 20% functional disability which is serious enough so as to potentially prevent her from

working at all. The decision of the Sixth Circuit implicitly authorizing a jury to disregard such evidence and to speculate outside the evidence arriving at a conclusion based on lay person's knowledge directly conflicts with the decision of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits and the opinion should be reviewed and reversed by the Supreme Court.

2. This Case Involves An Important, Direct & Unresolved Conflict With The Decision Of The United States Supreme Court In Bene v. Jeantet, 129 U.S. 683, 32 L.Ed. 803, 9 S.Ct. 428 (1889).

The decision of the Circuit Court below conflicts directly with the decision of the United States Supreme Court in Bene v. Jeantet, 129 U.S. 683, 32 L.Ed. 803, 9 S.Ct. 428 (1889). In Bene, the Court considered the testimony of two experts in a patent suit which, even though conflicting, involved the testimony by one expert who actually performed experiments within his knowledge and experience while the opposing expert testified based only on theory. The opinion testimony adopted by the court was founded on facts within the knowledge of an experience of the witness and is supported by valid reasoning. It therefore must receive greater credence and carry more weight than a speculative theory or one which is rendered by per-sons not fully qualified in the field about which they testify. See Bene v. Jeantet, supra and Aetna

Life Insurance Company v. Kelley, supra. The Court described the witnesses' conflicting opinions, only one of which was based upon actual training and experience of the expert, as follows:

> "The testimony of these two witnesses is conflicting but the testimony of Marchand relates to facts declared to be within his knowledge and experience; whilst that of Keith is largely the assertion of a theory and a presentation of arguments to show that the facts testified to by Marchand cannot exist. The experiments which Keith said he had made according to Marchand's formula and which failed to produce refined hair, were, as he admitted, his first experiments for that purpose; whilst those made by Marchand were the results of twelve years of practice, and attested themselves by the specimens produced."

In this case, the Court erred when it concluded that Dr. Gamboa's testimony had weaknesses exposed by cross-examination and therefore the jury could not properly do other than find within the range established by Dr. Gamboa. Where there is present, uncontradicted, unimpeached testimony on technical matters which are beyond the

common experience of the lay person's determination and foundation, the trier of fact cannot disregard the expert's testimony which must be conclusive. See U.S. v. Larkins, 657 F.Supp. 76, (1987) Affirmed 852 F.2d 189 (6th Cir. 1988) cert denied 109 S.Ct. 1131, 489 U.S. 1011, 103 L.Ed. 193, (1989).

3. **The Panel Decision Disregards Sixth Circuit Precedent And Violates *Stare Decisis*.**

The Panel's decision in this case conflicts with the Sixth Circuits decision in Roth Office Equipment Company v. Gallagher, 172 F.2d 452 (6th Cir. 1949) and the decision to do so without an En Banc Hearing of the Sixth Circuit violates the **Doctrine of *Stare Decisis***.

The **Doctrine of *Stare Decisis*** is deeply rooted in our tradition of common law. The Supreme Court has said:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every

> relevant pro-position in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. **The reasons for rejecting any established rule must always be weighed against these factors.**

Moragne v. States Marines Lines, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d. 339 (1970) (emphasis added). The interpretation of the rule of **stare decisis** is left to each court. Hertz v. Woodman, 218 U.S. 205, 212, 20 S.Ct. 621, 622, 54 L.Ed. 1001, 1005 (1910).

The Sixth Circuit has decided how the rule of **stare decisis** will be applied. A panel decision remains controlling unless an inconsistent decision of the Supreme Court requires modification, Salmi v. Secretary of Health and Human Service, 774 F.2d 685, 689 (6th Cir. 1985), there is a change in the substantive law, Smith v. U.S. Postal Service, 766 F.2d 205, 207 (6th Cir. 1985), or the Sixth Circuit sitting **en banc** overrules the decision. See Riddle v. Secretary of Health and Human Services, 817 F.2d 1238, 1244 (6th Cir. 1987) (Engel, Jr. dissenting), rehearing granted, 823 F.2d 164 (6th Cir. 1987).

In Roth Office Equipment Company v. Gallagher, supra, the Court held that unimpeached, uncontradicted

In Roth Office Equipment Company v. Gallagher, supra, the Court held that unimpeached, uncontradicted testimony from a well qualified witness should not be disregarded by the Court but that such testimony should be accepted by the fact finder in a manner in which the fact finder has no knowledge or experience on which he can exercise an independent judgment. In the instant case, precisely this fact situation existed. There was no basis on which the jury could exercise independent judgment because it had no knowledge or experience in complex economic theory, including but not limited to, the complex economic mathematical calculations by which the total amount of future wage losses are reduced to present value. The only testimony introduced into evidence on this question was provided by Dr. Gamboa who was imminently qualified to render his opinion and was admitted as a qualified expert. His testimony therefore constituted con-trolling evidence on which the jury's conclusion should have been based and it should not have been permitted to be disregarded. The failure of the Sixth Circuit to recognize and apply this principle violates its own precedent.

The **Doctrine of *Stare Decisis*** plays an important role in orderly adjudication and serves the broader societal interests and even handed, consistent and predictable application of legal rules. See Thomas v. Washington Gas

Light Company, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d. 757 (1980). The **Doctrine of *Stare Decisis*** weighty in any context, is especially so in matters of admissibility of expert testimony and the controlling effect of same. Reduced to its simplest forms, *Stare Decisis* means that like facts will receive like treatment in a court of law. Flowers v. U.S., 764 F.2d 759 (11th. Cir. 1985).

Tina Leap reasonably relied on the principle that unimpeached, uncontradicted evidence from the expert witness on a complex matter such as the reduction of her future wage loss would be the basis on which the jury would make its decision. Tina was unfairly deprived of the consistent, predictable administration of justice when the panel violated the Doctrine of *Stare Decisis* in its decision.

Justice Roberts comment dissenting in Smith v. Allwright, 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987, 1000 (1944), is apt:

> "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted and the Panel Opinion should be reversed and remanded with instructions to the Court to order a new trial to determine the proper amount of Tina Leap's lost future income.

Respectfully submitted,

MASTERS, MULLINS & ARRINGTON
1012 S. Fourth Street
Louisville, Kentucky 40203
(502) 582-2900
Attorneys for Petitioner
Christina Leap

BY: RICHARD L. MASTERS
EARL C. MULLINS, JR.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case No. 95-6470
Filed December 23, 1996

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nº. 95-6470

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINA LEAP	)	
Plaintiffs-Appellants,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
PAUL MALONE AND	)	DISTRICT OF TENNESSEE
F&K LEASING,	)	
Defendants-Appellees.	)	

Decided and Filed December 23, 1996

Before: **NELSON** and **DAUGHTREY**; Circuit Judge;
COHN, District Judge.*
DAVID A NELSON, Circuit Judge.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

This is a personal injury case, filed in federal court on diversity grounds, in which the plaintiff appeals from a judgment entered on a verdict in her favor for three quarters of a millon dollars. The plaintiff takes issue with (1) a directed verdict for the defendants on a claim for punitive damages, (2) the denial of a motion for additur, and (3) certain evidentiary rulings. Finding no error in any of the rulings in question, we shall affirm the judgment.

On November 25, 1992, the plaintiff, college sophomore Christina Leap, was one of two passengers in a Dodge auto-mobile that her grandfather, Paul Sipple, was driving on a state highway in McMinn county, Tennesee. Defendant Paul Malone, driving a 65-foot tractor trailer rig in the opposite direction, started to make a left turn directly in front of the oncoming Dodge. Mr. Malone either failed to see the Dodge or badly misjudged its distance from him. The automobile crashed head-on into the right rear wheels of the tractor. All of the occupants of the car were badly injured, and the second passenger, Mrs. Sipple, eventually died from her injuries.

Tennessee State Trooper Ray Yarber, Jr., arrived at the scene soon after the occurance of the accident, and he called for assistance from Trooper Ken Jones. The latter, an accident reconstruction expert, testified at trial that Mr. Sipple had less than two seconds to react to Mr. Malone's turn.

Trooper Yarber completed a Tennessee Uniform Accident Report form, checking boxes labeled "reckless endanger-ment" and "failure to yield". A McMinn County grand jury returned a "no bill" with respect to reckless endangerment, and Mr. Malone was never prosecuted for that offense. Both of the state troopers testified at trial that Mr. Malone had not been reckless, in their opinion.

Miss Leap suffered a severe closed head injury and internal bleeding of the brain. She remained in a coma for about a month, and she underwent four major operations during the course of her recovery. By the time of trial whe had incurred medical expenses of $246,677.93, and had received physical therapy for three years. It had been necessary for her to relearn her basic motor skills. With extensive tutoring, she had been able to resume a limited college curriculum.

Miss Leap and Mr. Sipple, on behalf of himself and as executor of Mrs. Sipple's estate, sued Mr. Malone and his employer in federal district court. The Sipple claims were settled prior to trial, and the defendants admitted liability for the damages suffered by Miss Leap. Before Ms. Leap's case came on for trial the district court (Collier, J.) granted motions *in limine* to exclude both the Uniform Accident Report and evidence concerning Mrs. Sipple's death and Mr. Sipple's injuries.

During the trial Dr. Anthony Gamboa, testifying as a "vocational economics" expert, offered an economic assessment of Miss Leap's pre- and post-accident abilities. He projected a lifetime wage loss of between $906,000 and $1.4 millon. The former figure was described as "extraordinarily optimistic." The latter figure, Dr. Gamboa testified, was what the wage loss would come to if Miss Leap could never work again. Dr. Gamboa assumed that if the accident had not occurred, Miss Leap could have earned and average of $36,744 per year for 31.9 years; he further assumed that she would now average no more than $19,834 per year for no more than 21 years.

At the close of Miss Leap's case-in-chief the district court directed a verdict in favor of the defendants of the issue of punitive damages. The jury ultimately assessed Miss Leap's recoverable damages at $754,677.83. This figure represented the sum of the following components:(1) $246,677.83 for past medical expenses; (2) nothing for future medical expenses; (3) $275,000 for past pain and suffering; (4) $133,000 for future pain and suffering; and (5) $100,000 for loss of earning capacity. Miss Leap filed motions for a new trial, based on allegedly erroneous evidentiary rulings, and for an additur, based on the allegedly inadequate award for loss of earning capacity. The district court denied both motions. Ms. Leap has perfected a timely appeal.

II

We turn first to the issue of punitive damages, an issue governed in this case by Tennessee law. Tennessee allow the recovery of punitive damages "only in the most egregious of cases." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896,901 (Tenn.1992). The least culpable mental state for which punitive damages may be awarded is "reckless" -- and recklessness must be proved by clear and convincing evidence. *Id.* The *Hodges* court held that a person acts recklessly when he "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Id.*

We believe the district court acted properly in directing a verdict on the issue of punitive damages. There is no evidence in the record, let alone clear and convincing evidence, to suggest that Mr. Malone's conduct was the result of anything more than inattention or a most unfortunate case of bad judgment. Trooper Jones -- the accident reconstruction expert -- testified that in hs judgment Mr. Malone's behavior had been "accidental," not reckless. Trooper Yarber characterized Mr. Malone's decision to turn when he did as a "mistake;" Yarber rejected a label of "reckless." In light of all of the evidence

presented in this case, we believe that a reasonable mind could draw only one conclusion -- that there was no basis for recovery of punitive damages. The directed verdict was therefore proper. See *Arms v. State Farm Fire & Cas. Co.*, 731 F.2 1245, 1248-49 (6th Cir. 1984) (citing *Holmes v. Wilson,* 551 S.W.2d 682, 685 (Tenn.1977)).

In *Womack v. Gettelfinger,* 808 f.2d 446 (6th Cir.1986), *cert. denied,* 484 U.S. 820 (1987), this court reversed a punitive damages award in another diversity case arising out of an automobile-truck accident in Tennessee. We held there that the defendant truck driver, who caused the collision by turning onto a highway in dense fog, had not been guilty of such gross or wanton negligence as could justify an award of punitive damages. "[P]oor judgment and lack of ordinary care," we observed, "...[are] not the stuff of which ... punitive damages awards are made -- at least not in Tennessee." *Id.* at 453. The Tennessee Supreme Court's decision in *Hodges* subsequently confirmed our understanding of Tennessee law, and we see no basis for deciding the case at bar differently than *Womack v. Gettelfinger.*

III

Miss Leap argues that the district court should have granted an additur to the jury's $100,000 award for loss of future wages. She notes that her expert, Dr. Gamboa,

offered the only evidence on the wage loss issue. Because Dr. Gamboa's testimony was "unimpeached [and] uncontradicted," Miss Leap argues, the jury acted irrationally in awarding a figure below the range proposed by Dr. Gamboa. We do not find the argument persuasive.

The jury was entitled to reject Dr. Gamboa's testimony entirely and to award no damages at all for future loss of wages. Miss Leap admits as much. Her argument boils down to the proposition that, having given some credence to Dr. Gamboa's testimony (as demonstrated by the award of some damages for future lost wages), and in the absence of alternative economic evidence, the jury had to accept the range proposed by Dr. Gamboa.

Defense counsel conducted an effective cross-examination of Dr. Gamboa, however, exposing apparent weaknesses in his opinion. And the jury could reasonably have concluded that the dismal picture of Miss Leap's future presented by Dr. Gamboa was contradicted by other evidence. Miss Leap heself testified that she hoped to become a physical therapist and had resumed -- albeit with tutorial assistance -- a college curriculum. The jury might well have believed that Ms. Leap would be able to work at full pay as a physical therapist, but that she would lose some earnings because her career would begin later than it would have done had there been no accident. This

hypothesis is consistent with the jury's election to award no damages for future medical expenses. We are satisfied that the district court did not abuse its discretion in refusing to grant an additur.

IV

The Federal Rules of Evidence govern diversity cases, see *Laney v. Celotex Corp.*, 901 F.2d 1319, 1320 (6th Cir. 1990), except where the state rule of evidence is substantive in nature. See, *e.g., CMI-Trading, Inc. v. Quantum Air, Inc.*, 98 F.3 887, 891 (6th Cir. 1996) (applying state parol evidence rule in a diversity case.)

A

As noted above, the district court granted the defendants' motion *in limine* to exclude the Uniform Accident Report completed by Trooper Yarber. Tennessee law expressly prohibits the use of accident reports as evidence. Tenn. Code Ann § 55-10-114(b). If this statute is "substantive" it must be applied in diversity cases. If the statute is merely "procedural," on the other hand, the Federal Rules of Evidence must be applied without regard to the statute.

The character of the Tennessee statute need not be definitely resolved here, for we do not believe that it was error to exclude the accident report under either hypothesis. If

the Tennessee statute governs, the statute clearly prohibits introduction of the accident report. If the statute does not govern, Rule 403 of the Federal Rules of Evidence, the text of which is set forth in the margin, amply supports the decision to exclude the report.[1] The probative value of the accident report was minimal, given the fact that the investigating officers were available to testify. The unfair prejudice, on the other hand, was patent. Mr. Malone was not prosecuted for reckless endangerment, a Tennessee grand jury having decided not to indict him on this charge. Troopers Yarber and Jones testified that, in their judgment, Mr. Malone had not been reckless. We assume the plaintiff would have been permitted to explore any inconsistency between this testimony and the report. The district knew, however, that there was no inconsistency -- for Trooper Yarber testified (ourside the jury's presence) that the reckless endangerment citation was issued due to the severity of the accident, not as a result of Mr. Malone's conduct. We cannot say that the district court abused its discretion in excluding the report.

---

[1]Rule 403 provides as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

B

Neither did the district court abuse its discretion in granting the defendants' motion to exclude evidence of Mrs. Sipple's death and Mr. Sipple's injuries after the Sipple claims had been settled.

As the district court noted, Miss Leap's claim for pain and suffering was extensively explored through Ms. Leap's own testimony and the testimony of her mother and the treating doctors. The relevance of the Sipples' fates to the pain and suffering of Miss Leap was overshadowed by the unfair prejudice to which the defendants would have been exposed if this evidence had been introduced after the Sipple claims had dropped out of the case.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case No. 95-6470
Filed February 10, 1997

Nº. 95-6470

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINA LEAP *Plaintiffs-Appellants,*	)	
v.	)	ORDER
PAUL MALONE AND F&K LEASING, *Defendants-Appellees.*	)	

Filed February 10, 1997

Before: **NELSON** and **DAUGHTREY**; Circuit Judge;
COHN, District Judge.*
DAVID A NELSON, Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

---

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel wishes to amend the first sentence of the third paragraph of page 2 of the opinion to read, "Trooper Yarber completed a Tennessee Uniform Accident Report form and cited the truck driver for 'reckless endangerment.'"

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Service:

Mr. Earl C. Mullins, Jr.
Masters, Mullins & Arrington
1012 S. Fourth Street
Louisville, KY 40203

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

JUDGMENT

Civil No. 1:93-CV-486
entered July 27, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

CHRISTINA LEAP	)	
Plaintiffs-Appellants,	)	
v.	)	JUDGEMENT IN A
	)	CIVIL CASE
PAUL MALONE; ALLOY	)	
FABRICATORS, INC. AND,	)	
F & K LEASING, INC.	)	Case No. 1:93-CV-486
Defendants-Appellees.	)	

[X] **Jury Verdict.** This action came before the Court for a trial by jury. the issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff Christina Leap recover nothing of the defendant Alloy Fabricators, Inc. and that the plaintiff Christina Leap recover of the defendants Paul L. Malone and F & K Leasing, Inc. damages in the sum of Seven Hundred Fifty-Four Thousand Six Hundred Seventy-Seven and 83/100

Dollars ($754,677.83). It is further ORDERED AND ADJUDGED that defendant's motion for judgment as a matter of law on plaintiff's claim for punitive damages is GRANTED.

July 27, 1995 — R. Murray Hawkins

Date

/s/ John L. Medows

(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MEMORANDUM AND ORDER

Civil No. 1:93-CV-486
filed September 19, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

CHRISTINA LEAP, PAUL SIPPLE, Individually, and PAUL SIPPLE Executor of the Estate of Martha Rose Sipple, deceased *Plaintiffs,*	)	
v.	)	No. 1:93-CV-486
PAUL E. MALONE, ALLOY FABRICATORS,INCORPORATED AND F&K LEASING INCORPORATED, *Defendants.*	)	JUDGE CURTIS L. COLLIER

Filed September 19, 1997

MEMORANDUM AND ORDER

This matter is before the Court upon the plaintiff's motions for new trial (Court File Nos. 65,66,67) and the plaintiff's motion for additur or, in the alternative, for new trial (Court File No. 68). After reviewing the record and the applicable law, the Court concludes the plaintiff's motions are without merit, and they will be **DENIED.**

Plaintiff raises four arguments. First, she contends the Court erred in excluding the Uniform Accident Report issued at the time of the accident, which contained a charge of "Reckless Endangerment" against defendant Malone. Second, she contends the Court erred in granting the defendant's motion for a judgment as a matter of law on the issue of punitive damages. Third, the Court erred in excluding evidence concerning the injuries suffered by Rose and Paul Sipple, the plaintiff's grandparents and fellow vehicle occupants. Lastly, the plaintiff contends she is entitled to an additur or, in the alternative a new trial, based upon the testimony of the plaintiff's economist and the jury's confusion over the issue of pain and suffering.

In this diversity action, the Court applies the substantive law of Tennessee. Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 56 F.3d 726, 733 (6th Cir. 1995), *citing* Bailey v. V & O Press Co., 770 F.2d 601, 604 (6th Cir. 1985). However, whether to grant a new trial is "a federal procedural question and is to be decided by reference to federal law." Strunk v. Hurley, 865 F.2d 261, No. 87-5948 (6th Cir. 1988)(unpublished opinion), *quoting* Toth v. Yoder Co., 749 F.2d 1190, 1197 (6th Cir. 1984). Under Fed. R. Civ. P. 59, "the question of granting or denying of a motion for a new trial following a jury verdict addresses ...the judicial discretion of the trial judge," and is subject to review under the abuse of discretion standard. Toth, 749 F.2d at 1197. "[W]hile the district judge has a

duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached." Bruner v. Dunaway, 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (*quoting* TCP Indust. v. Uniroyal, Inc., 661 F.2d 542, 546 (6th Cir. 1981) (quoting Duncan v. Duncan, 377 F.2d 49, 52-53 (6th Cir. 1967), *cert. denied*, 389 U.S. 913 (1967))). Thus, the Court's responsibility is "to prevent an injustice..."Davis v. Jellico Comm. Hosp., Inc., 912 F.2d 129, 133 (6th Cir. 1990) (*quoting* Kilgore v. Greyhound Corp., 30 F.R.D. 385, 387 (E.D. Tenn. 1962)).

A. Exclusion of the accident report

The plaintiff first argues the Court incorrectly excluded the introduction of Plaintiff's Exhibit No. 1, the Uniform Accident Report, and disallowed the testimony of the state troopers concerning the citation for "Reckless Endangerment" set forth in the report. The plaintiff contends these decisions kept the jury from understanding the accident investigation. This evidence, according to the plaintiff, would have served two purposes: to negate Trooper Yarber's testimony he did not believe defendant Malone's actions were reckless and to show the severity of the accident.

Tenn. Code Ann. § 55-10-114(b) provides in pertinent part no accident reports "shall be used as evidence in

any trial, civil, or criminal, arising out of an accident." As with Tenn. Code Ann. §55-9-604 which excludes evidence of non-use of a seatbelt in connection with mitigation of damages, the Court found the Tennessee statutory provision barring admission of accident reports to be substantive rather than procedural and, thus, to be followed by this Court in a diversity action such as this one. However, even if such a provision did not exist, the report's trustworthiness and reliability were called into serious question when both state troopers, present at the scene of the accident and who authored the report, stated under oath defendant Malone's conduct was not reckless but merely negligent. Moreover, the Court took into consideration that Mr. Malone was never formally charged with reckless endangerment and was not convicted of such a charge. Even if the Court had held that the report was admissible to impeach Trooper Yarber, the report itself would not have constituted substantive evidence which could have been used in the manner sought by plaintiff. Fed.R.Evid. 801(d)(1). In light of Tennessee substantive law and testimony adduced at trial, the Court finds no error in the exclusion of the accident report and no basis for a new trial.

B. Punitive damages

Next, the plaintiff contends the Court erred in granting judgment as a matter of law on the issue of punitive damages. The standard for considering a motion

for judgment as a matter of law in diversity cases under Rule 50, Federal Rules of Civil Procedure, is the state standard for a directed verdict. Arms v. State Farm & Cas. Co., 731 F.2d 1245 (6th Cir. 1984). That standard in Tennessee requires the trial court to

> ...take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be draw [sic] from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Id. at 1248 (quoting Holmes v. Wilson, 551 S.W.2d 682, 685 (Tenn. 1977)).

To be entitled to a recovery of punitive damages, the plaintiff had to prove by clear and convincing evidence defendant Malone's conduct was reckless and in conscious disregard of a substantial and unjustifiable risk "of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 900 (Tenn. 1992). The only evidence

presented to the jury[1] supporting the theory of recklessness was (1) the testimony of Sharon Richesin who stated defendant Malone, at the scene, indicated he had not seen the car in which the plaintiff was passenger and (2) the accident itself. On the other hand, the countervailing evidence was overwhelming. Both state troopers present at the scene testified defendant Malone's conduct was not reckless, and defendant Malone testified he misjudged the speed and distance of the oncoming car. None of this evidence supports a theory of reckless conduct as defined by the Tennessee Supreme Court, but, in fact, most, if not all, of it contradicts such a theory. As such, the Court finds no error in granting judgment as a matter of law on the issue of punitive damages and finds no basis for granting a new trial.

C. Rose and Paul Sipple's injuries

The plaintiff also contends she is entitled to a new trial based upon the Court's exclusion of evidence relating to injuries suffered by Rose and Paul Sipple, including the death of Rose Sipple. In its motion for a new trial based upon the exclusion of this evidence, the plaintiff contends such evidence was admissible as relevant to the plaintiff's

---

[1]As previously discussed, the Court excluded the accident report which contained the charge of "Reckless Endangerment" at trial.

pain and suffering in having to deal with the death of her grandmother and the injuries suffered by her grandfather. However, in its earlier response to the defendant's motion in limine, the plaintiff argued such evidence was admissible as describing the accident and the nature of plaintiff's own injuries. (Court File No. 56) The Court excluded such evidence on the grounds it was not relevant and any probative value was outweighed by the substantial prejudice to the defendants. The nature and extent of the plaintiff's injuries, both physical and emotional, were thoroughly established by the testimony of the plaintiff, her mother and the medical proof submitted by the plaintiff. Any additional evidence concerning the injuries of the other occupants of the vehicle would have been irrelevant and unduly prejudicial to the defendants' case, especially in light of the Court's ruling in connection with punitive damages. The Court, therefore, finds no error in the exclusion of said evidence and no basis for granting a new trial.

D. Additur

The jury awarded the plaintiff the following damages:

Medical Expenses	$246,677.83
Future Medical Expenses	-0-
Pain & Suffering	275,000.00
Future Pain & Suffering	133,000.00
Loss of Earning Capacity	100,000.00
Total	**$754,677.83**

The plaintiff contends the jury award for loss of earning capacity is too low based upon the testimony of its economist. The jury, as instructed, had the discretion to accept some, all or none of the expert witness's testimony. Further, any confusion the jury may have had concerning pain and suffering was alleviated by subsequent communication with the Court during the course of deliberations. While Tenn. Code Ann § 20-10-101 would permit additur in this case, this Court does not find the jury's award to be outside the "range of reasonableness" based on the evidence adduced at trial. Smith v. Shelton, 569 S.W.2d 421, 427 (Tenn. 1978). The Court will not substitute its judgment for the jury's and, accordingly does not view this argument as a basis for a new trial.

For the reasons set forth herein, the plaintiff's motions for new trial and additur are hereby **DENIED.**

SO ORDERED.

ENTER:

/S/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 13 1997
OFFICE OF THE CLERK

No. 96-1798

In The

Supreme Court of the United States

October Term, 1996

CHRISTINA LEAP and PAUL SIPPLE, Individually and PAUL SIPPLE, Executor of the Estate of MARTHA ROSE SIPPLE, Deceased,

Petitioners,

vs.

PAUL MALONE, ALLOY FABRICATORS, INC. and F&K LEASING, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID F. HARROD
Counsel of Record
JEFFREY L. CUNNINGHAM
CARTER, HARROD & CUNNINGHAM
Attorneys for Respondents
P.O. Box 885
One Madison Avenue
Athens, Tennessee 37371-0885
(423) 745-7447

71301 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Whether the United States Courts of Appeal, in unison, permit a jury to reject expert testimony?

2. Whether the decision of the United States Court of Appeals for the Sixth Circuit in the present case is congruent with prior decisions of the Supreme Court of the United States regarding a jury's rejection of expert testimony?

3. Whether the decision of the United States Court of Appeals for the Sixth Circuit in the present case is congruent with prior decisions of the Sixth Circuit regarding a jury's rejection of expert testimony?

LIST OF INTERESTED PARTIES

The Petitioners are correctly identified in the caption of the case.

The Respondents are correctly identified in the caption of the case. David F. Harrod of Carter, Harrod & Cunningham is counsel of record for Respondents.

Each of the Respondents join in this Brief in Opposition. For the Respondents, neither parent companies nor nonwholly owned subsidiaries exist.

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Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari ("Petition") by which Petitioners seek review of an Opinion of the United States Court of Appeals for the Sixth Circuit. The Opinion for which Petitioner seeks review is *Leap v. Malone*, No. 95-6470 (6th Cir. Dec. 23, 1996).[1]

STATEMENT OF JURISDICTION

The Petitioners have timely filed their Petition for Writ of Certiorari. The Petitioners have properly invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The present case arises out of a vehicular accident which occurred on November 25, 1992, in McMinn County, Tennessee, between a 1988 Dodge automobile driven by Petitioner Paul Sipple, the grandfather of Petitioner Christina Leap, and a 1986 tractor-trailer driven by Respondent Paul E. Malone. (R. 1.)[2] As a result of the accident, Petitioner Leap sustained serious injuries resulting in extensive hospitalization and therapy. Petitioner Leap incurred pre-trial medical expenses in the amount of Two Hundred Forty-Six Thousand Six Hundred Seventy-Seven and 83/100 Dollars ($246,677.83). (R. 78: Carol Sipple at Tr. 131.)

Prior to trial, Respondents Malone and F & K Leasing,

---

1. For the convenience of the Court, all citations to the foregoing Opinion are to a copy of the Opinion incorporated in the Petition as Appendix A.

2. All citations to transcripts, exhibits and a record in the underlying case are to such as were submitted to the United States Court of Appeals for the Sixth Circuit.

Inc., admitted liability for compensatory damages sustained by Petitioner Leap, leaving for resolution the issues of the amount of compensatory damages and the entitlement of Petitioner Leap to recovery of punitive damages. Another issue for resolution was the liability, if any, of Alloy Fabricators, Inc., for the negligence of Malone. Petitioners had filed suit against Alloy Fabricators, Inc., the lessee of the tractor-trailer which, at the time of the accident, Malone was driving for his employer, F & K Leasing, Inc.

The case was tried in the United States District Court for the Eastern District of Tennessee at Chattanooga before the Honorable Curtis L. Collier and a jury of nine (9) men and women. The trial began on Monday, July 24, 1995, and concluded on Wednesday, July 26, 1995. At the conclusion of Petitioner's proof, the District Court directed a verdict in favor of the Respondents on the issue of punitive damages. Following completion of all proof, argument of counsel and the charge of the Court, the jury retired for deliberations and returned a verdict in favor of Leap and against Malone and F & K Leasing, Inc., in the total amount of Seven Hundred Fifty-Four Thousand Six Hundred Seventy-Seven and 83/100 Dollars ($754,677.83). By jury verdict, Alloy Fabricators, Inc., was dismissed from the case. (R. 64.)

Following the trial, counsel for Petitioner Leap timely filed Motions for Additur and/or New Trial on the issues of punitive damages, damages for Petitioner Leap's loss of earning capacity, exclusion of an accident report and exclusion of certain testimony during the trial. The foregoing Motions were denied and overruled in a Memorandum and Order of the United States District Court for the Eastern District of Tennessee at Chattanooga entered on September 19, 1995. (Pet. at App. D.) Consequently, counsel for Leap filed a Notice of Appeal and presented the foregoing issues for resolution by the United States

Court of Appeals for the Sixth Circuit. In an Opinion entered December 23, 1996, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. Subsequently, Petitioners moved for a Rehearing *En Banc* or, alternatively, for a Panel Hearing which was denied by Order of the United States Court of Appeals for the Sixth Circuit entered February 10, 1997. (Pet. at App. B.)

B. Correction of Misstatements in the Petition

The Opinion of the United States Court of Appeals for the Sixth Circuit correctly describes the underlying facts of the present case. However, the Petition contains misstatements regarding the trial phase of the case. Pursuant to Sup. Ct. R. 15.2, Respondents respectfully bring to the attention of this Honorable Court misstatements in the Petition.

Petitioner states categorically that the testimony of Petitioner's experts, particularly the testimony of Anthony Gamboa, Ph.D., was both "uncontradicted" and "unimpeached." (Pet. at 5, 8, 9, 17.) The Petition further misstates that no rebuttal testimony contradicts the expert testimony pertaining to Petitioner Leap's education, earning capacity and other issues. (Pet. at 9, 11.)

The foregoing misstatements are clearly contrary to the record below. Dr. Gamboa's report, (Ex. 64-R. 80: Ex. 64 at Tr. 284), and his testimony on cross-examination, (R. 80: Dr. Gamboa at Tr. 314-15), conclusively establish that he neither reviewed nor relied upon the deposition testimony of Petitioner Leap's treating physicians when arriving at his own opinions regarding Leap's loss of earning capacity. Likewise, Dr. Gamboa neither reviewed nor relied upon Petitioner Leap's transcript from Northern Kentucky University where she was attending college classes following the accident. It is undisputed that, when he arrived at his opinions and conclusions, Dr. Gamboa did not

have the benefit of information relating to the course work completed by Petitioner Leap following the accident in question.

Dr. Gamboa's testimony that Plaintiff would be confined to a "sheltered workshop setting," (R. 80: Dr. Gamboa at Tr. 313), is incredible, given the fact that Petitioner Leap testified that, following the accident in question, she had completed college courses in psychology, chemistry, sociology, pre-calculus and an analytical writing course and that she would be enrolled full-time in Northern Kentucky University in the fall of 1995 for courses in physics, statistics and biological terminology, (R. 80: Christina Leap at Tr. 269, 271-72.) Petitioner Leap testified that she is working toward completion of a college degree with a physical therapy major and that her occupational goal is to become a physical therapist. (R. 80: Christina Leap at Tr. 272-73.)

Petitioner Leap's experts gave inconsistent testimony. Dr. Gamboa testified that, in his opinion, Petitioner Leap was occupationally disabled from a neuropsychological perspective. (R. 80: Dr. Gamboa at Tr. 287-88). He was unaware that Dr. Dennis Sprague, Petitioner's expert neuropsychologist, had testified that he could not state whether or not Petitioner Leap would ever regain her pre-accident level of intelligence. (R. 80: Dr. Dennis Sprague at Tr. 276; Dr. Sprague's deposition: p. 32.)

The evidence and proceedings in the District Court negate Petitioner's categorical assertion of uncontradicted, unimpeached testimony. The Court of Appeals, in its Opinion, made the following conclusion:

> Defense counsel conducted an effective cross-examination of Dr. Gamboa, however, exposing apparent weaknesses in his opinion. And the jury could reasonably have concluded that the dismal picture of Miss

> Leap's future presented by Dr. Gamboa was contradicted by other evidence. Miss Leap herself testified that she hoped to become a physical therapist and had resumed — albeit with tutorial assistance — a college curriculum.

(App. A at A-7.)

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURTS OF APPEAL, IN ACCORD WITH EACH OTHER, PERMIT A JURY TO REJECT EXPERT TESTIMONY EVEN IF SUCH TESTIMONY IS UNCONTRADICTED.

Each of the Circuits upholds the general rule that the trier-of-fact is under no obligation to accept the testimony of an expert witness even if the testimony of the expert witness is unimpeached or uncontradicted. *Aldridge v. Baltimore and Ohio R.R.*, 789 F.2d 1061, 1065 (4th Cir. 1986); *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1325 (Fed. Cir. 1987); *Dickerson v. Amax, Inc.*, 739 F.2d 270, 273-74 (7th Cir. 1984); *Fisher v. Vassar College*, 70 F.3d 1420, 1447-48 (2d Cir. 1995); *Gregg v. U.S. Indus.*, 887 F.2d 1462, 1469-70 (11th Cir. 1989); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978); *Howell v. Gould, Inc.*, 800 F.2d 482, 485 (5th Cir. 1986); *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 930 (10th Cir. 1984), *cert. denied*, 469 U.S. 853 (1984); *Mopkins v. St. Louis Die Casting Corp.*, 569 F.2d 454, 455 (8th Cir. 1978); *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797-98 (6th Cir. 1996), *cert. denied*, 136 L. Ed. 375 (1997); *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 5 (1st Cir. 1992); *United States Steel Corp. v. Occupational Safety and Health Review Comm'n.*, 537 F.2d

780, 783-84 (3d Cir. 1976). Contrary to Petitioner's assertion, no direct and unresolved conflict exists between the Circuits regarding a jury's refusal to accept expert testimony.

To force a jury to render its decision within the parameters of expert testimony is to place the responsibility for the ultimate decision in a case in the hands of experts rather than the hands of the Court. *Del Mar Avionics*, 836 F.2d at 1325. In *Del Mar Avionics*, the defendant asserted that the Trial Court "erred in failing to construe the patent terms" of an invention for the electronic detection of heart abnormalities "in accordance with the testimony" of the defendant's patent expert. *Id.* On appeal, the United States Court of Appeals for the Federal Circuit concluded that "a district court is not obliged to adopt a conclusion stated by an expert witness." *Id.* Even though the expert testimony in the underlying case was "generally correct and accurate," the court was obligated only to "weigh expert and other testimony; it is the Court's, not the expert's, responsibility to decide the case." *Id.* The "finder of fact" has no obligation to accept the uncontradicted testimony of an expert simply because the expert is qualified as such. *Fisher*, 70 F.3d at 1447.

"Uncontradicted expert opinion testimony is not conclusive, and the jury has every right not to accept it." *Gregg*, 887 F.2d at 1470. In *Gregg*, the defendant challenged the jury's rejection of the testimony of the defendant's experts regarding valuation of the plaintiff's company. *Id.* at 1469-70. On appeal, the United States Court of Appeals for the Eleventh Circuit noted that the defendant neither objected "to the proposed jury instruction regarding the expert testimony . . . nor did it dispute the charge given at trial that the jury was to consider the expert testimony and give it the weight the jury determined the testimony deserved." *Id.* at 1470 (footnote omitted). The court concluded that the expert testimony was not conclusive and that the jury had "every right not to accept it." *Id.*

In like manner, the Petitioner in the present case neither objected to the jury instructions nor disputed at trial that the jury was not obligated to accept the testimony of the experts. (R. 80: Jury Charge at Tr. 365.) "Jurors are not bound to accept the uncontradicted opinions of expert witnesses but have a right to use their own common sense and experience and to draw all reasonable inferences from the physical facts and occurrences." *Remington Arms Co. v. Wilkins*, 387 F.2d 48, 54 (5th Cir. 1967) (citing *Seaboard Sur. Co. v. First National Bank of Montgomery*, 263 F.2d 868, 871 (5th Cir. 1959)).

"Opinions testified to by an expert are certainly not binding on the court." *Mopkins*, 569 F.2d at 455. Testimony by an expert witness is "subject to the same tests and credibility and weight as is any other admissible evidence." *Moe*, 727 F.2d at 930.

"The rule is well settled that expert opinion testimony, even if not directly contradicted, is not ordinarily binding on a jury . . . . the rule is particularly apropos in a case where the expert's testimony, read in the larger context of the evidence as a whole, lacks great convictive force." *Quinones-Pacheco*, 979 F.2d at 5. In *Quinones-Pacheco*, the plaintiff, who alleged that she had suffered injuries in a bumpy flight through turbulent weather, appealed the verdict in favor of the defendant, American Airlines, and challenged the jury's treatment of her expert's medical opinion testimony. The Court of Appeals identified "four major weaknesses" with the expert's medical opinion on causation. *Id.* The Court of Appeals concluded that, even though the expert's medical opinion testimony was not directly contradicted, the testimony, "in the larger context of evidence as a whole" lacked "great convictive force" and the jury was not bound by the testimony. *Id.*

In the present case, the "convictive force" of the testimony of Petitioner's expert, Dr. Gamboa, was decreased in the "larger context of the evidence as a whole" by the inadequate basis for Dr. Gamboa's report and testimony, the deposition testimony

of Petitioner's treating physicians, the post-accident educational achievements of the Petitioner at Northern Kentucky University and inconsistencies with the testimony of Dr. Sprague, an expert for the Petitioner. *Id.* (R. 80: Dr. Gamboa at Tr. 314-15; R. 80: Christina Leap at Tr. 269, 271-72; R. 80: Dr. Sprague at Tr. 276.) Even if Dr. Gamboa's testimony stood unassailed in "the larger context of the evidence as a whole," his testimony would not be "ordinarily binding on a jury." *Quinones-Pacheco*, 979 F.2d at 5. "Expert testimony need not be accepted even if uncontradicted." *United States Steel*, 537 F.2d at 783; *see Moore v. Johns-Manville Sales Corp.*, 781 F.2d 1061, 1064-65 (5th Cir. 1986) (concluding that juries "are not bound to follow the experts"); *Jones v. N.V. Nederlandsch-Amerikaansche Stoomvaart Maatschappij*, 374 F.2d 189, 190 (3d Cir. 1966).

The alleged conflicts among the circuits regarding the treatment of expert testimony disappear upon a closer analysis of the cases cited by Petitioner. This Court may easily reconcile the decisions in *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 531 (10th Cir. 1962), and *Stafos v. Missouri Pacific R.R.*, 367 F.2d 314, 317 (10th Cir. 1966), with the later decision by the Court of Appeals for the Tenth Circuit in *Moe*, 727 F.2d at 930. The cases of *Stafos* and *Potucek* speak of a duty to honor "controlling, positive, uncontradicted and unimpeached" evidence. *Potucek*, 310 F.2d at 531; *Stafos*, 367 F.2d at 317. The decision in *Moe* states that "expert witness testimony is subject to the same tests of credibility and weight as is any other admissible evidence." *Moe*, 727 F.2d at 930. As required by *Moe*, the trier of fact determines the weight to be given to expert and any other testimony. If the trier of fact finds such testimony to be "controlling, positive, uncontradicted and unimpeached," the trier of fact must honor its finding. *Stafos*, 367 F.2d at 317. The earlier decisions of *Stafos* and *Potucek* do not absolve the jury of its paramount responsibility to evaluate the credibility of testimony and to weigh the testimony with all the evidence.

Furthermore, the expert testimony of Dr. Gamboa in the present case was neither unimpeached nor uncontradicted. The Court of Appeals in *Stafos* clearly provides that, if the evidence is not "all one way," the jury has absolutely no responsibility to "honor" the expert testimony. *Stafos*, 367 F.2d at 317. Likewise, the Court of Appeals in *Potucek*, in dicta of the case, discusses a responsibility to honor uncontradicted and unimpeached evidence only where "no circumstance reflected on the record casts doubt on its verity." 310 F.2d at 531.

Petitioner's reliance upon *Aetna Life Ins. Co. v. Kelley*, 70 F.2d 589, 593 (8th Cir. 1934), is without merit, and the rule in *Aetna* upon which Petitioner relies is inapplicable to the present case. In *Aetna*, the Court of Appeals concluded that lay witnesses were incompetent to testify about the causation and existence of specific diseases where such causation or existence is not "open to the senses." *Id.* The issue in *Aetna* revolved not around an alleged obligation of the jury to accept expert testimony, but, rather, the competency of lay witnesses to testify regarding medical facts in issue.

Other cases cited by the Petitioner in support of her position clearly support the decision of the Court of Appeals for the Sixth Circuit in the present case. The Court of Appeals for the Ninth Circuit in *Security-First National Bank of Los Angeles v. Lutz*, 322 F.2d 348, 355 (9th Cir. 1963), states that "expert testimony . . . is not conclusive upon the trier of fact, even though unimpeached and uncontradicted, since the trier may apply his own experience or knowledge in determining how far to follow the expressed opinion." The Court of Appeals for the Eighth Circuit in *Estate of Fitts v. Commissioner*, 237 F.2d 729, 732-33 (8th Cir. 1956), states that "the court is not bound by the opinion of the experts" and that expert testimony may be accepted "in toto, in part, or not at all." *Id.* (citing *Gloyd v. Commissioner*, 63 F.2d 649, 650 (8th Cir. 1953)). Likewise, reliance upon *Greenfeld v. Commissioner*, 165 F.2d 318, 319 (4th Cir. 1947), because of the foregoing analysis, controverts

rather than bolsters the Petitioner's argument. *Fitts*, *Greenfeld* and *Charles of the Ritz Distributors v. Federal Trade Comm'n*, 143 F.2d 676, 679 (2d Cir. 1944), are further distinguished from application to the present case by their underlying subject matter which invokes federal regulatory procedures and rules that are irrelevant in the present civil action.

Furthermore, under substantive Tennessee law, which is applicable in the present case, a jury is under no obligation to accept expert testimony as conclusive, but may give such testimony the weight which the jury believes it is entitled in view of all the evidence presented in a trial. *England v. Burns Stone Co.*, 874 S.W. 2d 32, 38 (Tenn. Ct. App. 1993). "Jurors are not required to accept expert or opinion evidence as conclusive, even though uncontradicted; but may draw upon the knowledge and experience which may be supposed to be common to all men and arrive at a conclusion contrary to expert testimony." *Id.* "Even when no opposing expert testimony is offered, the trier of fact is still bound to decide the issue upon its own fair judgment, assisted by expert testimony." *Roberts v. Roberts*, 827 S.W. 2d 788, 795 (Tenn. Ct. App. 1991) (citing *Gibson v. Ferguson*, 562 S.W. 2d 188, 190 (Tenn. Ct. App. 1976)).

The District Court in the present case correctly charged the jury that it was not required to accept the testimony of any expert and that, in determining how much weight to give to an expert's opinion, consideration should be given to the qualifications of the expert witness and the basis of the witness's conclusions. The District Court further charged the jury that it alone had the responsibility of determining the weight to be given to the testimony of an expert witness. (R. 80: Jury Charge at Tr. 365.) Petitioner raised no challenge to any portion of the charge delivered by the District Court, and the jury charge clearly followed applicable Tennessee law on the issue of the weight, if any, to be given to the opinion testimony of an expert witness.

See Airline Constr., Inc. v. Barr, 807 S.W. 2d 247, 270-71 (Tenn. Ct. App. 1990).

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THE PRESENT CASE IS CONGRUENT WITH PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The Supreme Court of the United States has previously ruled, regarding expert testimony, that, "if the Court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878). Expert opinions "thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidenced generally, whether addressed to a jury or to a judge or to a statutory board." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) (quoting *Dayton Power & Light Co. v. Public Util. Comm'n*, 292 U.S. 290, 299 (1934)). The decision of the Court of Appeals for the Sixth Circuit in the present matter is in harmony with United States Supreme Court jurisprudence and neither directly nor indirectly contravenes the decision of any opinion by the Supreme Court of the United States.

The case of *Bene v. Jeantet*, 129 U.S. 683 (1889), is distinguished from the present case on several points. In *Bene*, the Supreme Court affirmed the decision of the Circuit Court of the United States for the Southern District of New York to dismiss the plaintiff's bill without prejudice because the plaintiff had failed to prove his sole issue of alleged infringement on a patent for an invention for the refinement of hair. *Id.* at 684-88. After reviewing the evidence presented at trial, including testimony of experts for both parties, the Supreme Court

concluded that the "complainants did not make out a case of infringement" and that there was "not a preponderance of evidence in their favor." *Id.* at 688. The Supreme Court in *Bene* did not mandate that the trier of fact in the lower court accept uncontradicted or controlling expert testimony. Rather, the Supreme Court upheld the responsibility of the trier of fact to weigh the testimony and evaluate its credibility.

III.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CONGRUENT WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT.

The United States Court of Appeals for the Sixth Circuit clearly upholds the rule that a jury is not required to accept expert testimony even though such testimony may be uncontradicted and unimpeached. *Powers*, 83 F.3d at 797. In *Powers*, the plaintiffs challenged the following instruction regarding treatment of the testimony of the plaintiffs' expert:

> You are not required to accept testimony even though the testimony is uncontradicted and the witness is not impeached.

Id. The Court of Appeals held that the trial court did not err "in so instructing the jury." *Id.* "The jury is instructed that it is completely free to accept or reject an expert's testimony, and to evaluate the weight given such testimony in light of the reasons the expert supplies for his opinion." *Id.* (quoting *The United States v. 0.161 Acres of Land, More or Less, Situated in the City of Birmingham, Ala.*, 837 F.2d 1036, 1040-41 (11th Cir. 1988)).

The decision of the Court of Appeals in the present case regarding the testimony of the Petitioner's expert, which

testimony stood neither uncontradicted nor unimpeached, is clearly consistent with the foregoing rule in *Powers*, and, therefore, consistent with the doctrine of *stare decisis*. The rule in *Roth Office Equip. Co. v. Gallagher*, 172 F.2d 452, 455 (6th Cir. 1949), if it remains valid, does not control the decision of the District Court in the present case because the testimony of the Petitioner's expert does not satisfy the stringent elements for the application of *Roth*. In the present case, the testimony of Petitioner's expert was effectively disputed, and matter upon which the witness testified was that upon which the jury, in view of contrary evidence, could exercise its independent judgment.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit to permit the jury in the present case to reject expert testimony is in accord with prior decisions of the Court of Appeals for the Sixth Circuit, the Supreme Court of the United States and similar decisions throughout the Courts of Appeal in each of the federal circuits. Therefore, this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

DAVID F. HARROD
Counsel of Record
JEFFREY L. CUNNINGHAM
CARTER, HARROD & CUNNINGHAM
Attorneys for Respondents
P.O. Box 885
One Madison Avenue
Athens, Tennessee 37371-0885
(423) 745-7447

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No. 96-1798

In The
Supreme Court of The United States
October Term 1996

CHRISTINA LEAP AND PAUL SIPPLE, INDIVIDUALLY AND PAUL SIPPLE, EXECUTOR OF THE ESTATE OF MARTHA ROSE SIPPLE, DECEASED,
Petitioners,

v.

PAUL MALONE, ALLOY FABRICATORS, INC. AND F & K LEASING, INC.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

*RICHARD L. MASTERS
EARL C. MULLINS, JR.
MASTERS, MULLINS & ARRINGTON
1012 S. Fourth Street
Louisville, Kentucky 40202
(502) 582-2900
**Counsel of Record*

September 25, 1997

LEGAL ADVANTAGE * 432 Walnut St. * Cincinnati, OH 45202 * (800) 581-2252

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III. INTRODUCTION

In her initial brief, Petitioner demonstrated that the decision below conflicts with the decisions of the Second, Fourth, Fifth, Eighth, Ninth & Tenth Circuits concerning conclusive effect of expert testimony on an issue such as economic calculations which only an expert is competent to calculate. Petitioner further demonstrated that the panel decision conflicts with the Sixth Circuit's own precedent including Roth Office Equipment Company v. Gallagher, 172 F. 2d 452 (6th Cir. 1949) and the decision to do so without an En Banc Hearing therefore violates the doctrine or Stare Decisis.

Finally, petitioner has shown that the U.S. Supreme Court does not authorize a jury to speculate on its own where a complex question requires the aid of expert testimony in order to resolve it.

A. THE COURTS OF APPEAL DO NOT PERMIT A JURY TO SPECULATE ON A COMPLEX ECONOMIC CALCULATION WHICH REQUIRES THE AID OF AN EXPERT TO RESOLVE IT.

What the Appellee is arguing is that the jury may disregard the range of

evidence presented by the only economic expert and independently compute present value of permanent loss of earning capacity while accepting the expert's premise that Appellant was permanently impaired and suffered wage loss as a result. Appellee has cited no cases that contradict the rule enunciated in Roth, supra. Stafos v. Missouri Pacific Railroad Company, et. al., 67 F.2d 314 (10th Cir. 1966); Aetna Life Ins. Co. vs. Kelley, 70 F.2d 589 (8th Cir. 1934); Greenfeld v. C.I.R., 165 F.2d 318 (4th Cir. 1948); Charles of the Ritz Distrib. Corp. vs. F.T.C., 143 F.2d 676 (2nd Cir. 1944); N.L.P.B. vs. Ray Smith Transport Co., 193 F.2d 142 (5th Cir. 1952); Security First Natl. Bk. of L.A. vs. Lutz, 322 F.2d 348 (9th Cir. 1963) or Fitts Estate v. C.I.R., 237 F.2d 729 (8th Cir. 1944). As shown by these cases, the Courts of Appeal have consistently held that with respect to complex matters of which laymen are not expected to have reliable knowledge and information, the testimony of the expert cannot be ignored by the trier of fact in making their decision. Reduction of the amount of permanent loss of earning capacity to present economic value is an economic calculation of such sophistication involving so many statistical variables

that laymen cannot possibly have the knowledge and skill necessary to make such a computation. If it were not so, no expert economic testimony would be required in order to put the amount of such damages before the jury.

While Appellant and Appellees do agree with the limited position that the jury did have discretion to disregard Dr. Gamboa's testimony entirely and award nothing for lost earning capacity, once the jury decided that Ms. Leap had, in fact, suffered permanent lost earning capacity, as it obviously did by awarding $100,000.00, there is no discretion to disregard the range of evidence produced by the only competent economic expert to give testimony in this case in the absence of some alternative computation. While the Defendants attempted to raise questions on cross examination concerning whether or not Tina Leap should be confined to a sheltered workshop environment for the duration of her worklife expectancy, Dr. Gamboa (the only witness to testify concerning the economic impact of the loss of earning capacity) most clearly stated his opinion that a loss of over $900,000.00 was the optimistic view and that a pessimistic view could be taken in which event the

jury's award should be $1.4 million dollars.

Obviously, Dr. Gamboa qualified his opinion expressing the most conservative position which assumes that Ms. Leap will in fact complete a college degree and obtain employment at $20,000.00 per year in average income on a present value basis as opposed to the estimated $36,000.00 per year which Gamboa conservatively stated that she would have earned but for the permanent disability that she sustained.

Moreover, the Appellees have not cited any testimony whatsoever which contradicts the medical experts 20% permanent disability rating which was clearly part of the record. Appellees do not dispute this disability rating, they merely suggest maybe Tina will improve. Appellees wish to be rewarded with the benefit of the doubt that perhaps some day Tina Leap might show improvement which no expert determined.

Despite Appellees concessions as to the seriousness of Tina's injuries and the extensive nature of her hospitalization and therapy, the Appellees persist in their brief to

understate the impact of these injuries on her neuropsychological function and her cognitive performance academically and vocationally.

It is undisputed that Tina was in a comatose state for at least twenty-seven (27) days after the accident (R. 78: Carol Sipple at TR 93). It is undisputed that the closed head trauma sustained in the accident left her with brain dysfunction including dead brain tissue, increased susceptibility to seizures and resulting overall permanent disability of 20% to the whole person (R. 80: Dr. Dennis Sprague at TR 277 and P. Ex. 60 - Rpt of Dr. Dennis Sprague; R. 80: Dr. Anthony Gamboa at TR 288; R. 79: Carol Sipple at TR 159; P. Ex. 55 - EEG Rpt of Dr. Nancy McDonough).

The effect of these injuries on Tina's academic performance is also undisputed. Contrary to Appellees misinterpretations of this testimony, it is uncontradicted that Tina took psychology and chemistry as part of her therapy regimen and it took six (6) to nine (9) months for her to complete these courses even though the material covered in both courses only consisted of two (2) or three (3) chapters and one (1) exam

for each course. (R. 78: Carol Sipple at TR 135-137; R. 80: Tina Leap at TR 248-249). While she eventually completed a pre-calculus course after the accident, Tina required daily tutoring; tutoring before each test; and on weekends. Notwithstanding this extensive tutoring, she received a "C" for the course. (R. 79: Carol Sipple at TR 150-152; R. 80: Tina Leap at TR 251-253).

The other courses which Tina completed also required extensive tutoring in order to complete, including first aid and safety, and sociology which required daily tutoring, tutoring before each test and on weekends for the course work. Other courses had not been completed at the time the trial took place. (R. 79: C. Sipple at TR 150-152; R. 80: Tina Leap at TR 251-253). The effect of Tina's injuries on her cognitive function and academic performance is evident. Dr. Sprague's disability determination of Tina's 20% disability to the whole person has not been contradicted.

Appellees contention that Dr. Gamboa did not rely upon the medical reports and findings of Tina's treating physicians is incorrect. Dr. Gamboa

clearly testified that he relied upon the medical reports and findings of Tina's treating physicians, psychologists and therapists including Dr. Dennis Sprague, Dr. David Greenwald, Christina Ferguson, Karen Roberts, Angela Henson, Dr. Ron Koppenhoefer, Kristen Keiper and Dr. Nancy McDonough (R. 80: Dr. Anthony Gamboa at TR 314-315).

While Appellees contend that Dr. Gamboa did not review a list of all the college courses which Tina had completed or in which she was enrolled, Dr. Gamboa clearly testified that additional information about Christina was supplied to him during the seven (7) month interval between his initial report and the trial and that this information was considered in arriving at the "... best representation of her future loss in earning capacity ..." (R. 80: Dr. Anthony Gamboa at TR 285). As described by Dr. Gamboa:

> "The low end ($906,000.00) is an extraordinarily optimistic prediction. The high end ($1,400,000.00) represents a dollar

> figure that assumes she will never earn money as an employee for the remainder of her life. The best representation of her lost earning capacity is within those two figures. Where it is, I can't tell you, but it's between these two. (R. 80: Dr. Anthony Gamboa at TR 285-286).

In summary, while the jury had authority to disregard Gamboa's testimony and award nothing, once it decided to make an award for permanent lost earning capacity, the only economic testimony provided by the expert in this area was required to be used as a basis for the range of evidence. This was not done. Thus the remedy of Additur or a New trial on this issue was the appropriate response which the Trial Court should have granted and which decision the Court below should have reversed and remanded.

B. <u>WHETHER THE SIXTH CIRCUIT'S DECISION IS IN CONFORMITY WITH STARE DECISIS IN THE CIRCUIT.</u>

Contrary to Respondent's arguments, the herein decision by the Panel was not in conformity with the Stare Decisis of the Circuit as set forth in Roth Office Equipment, Co. vs. Gallagher, 172 F.2d 452 (6th Cir. 1949) and the decision to do so without an En Banc Hearing of the Sixth Circuit violates the Doctrine of Stare Decisis. Roth held that unimpeached, uncontradicted testimony from a well qualified witness should not be disregarded by the Court, and such testimony should be accepted by the finder of fact (jury) regarding matters in which the fact finder has no knowledge or experience in which he can exercise independent judgment. In a later decision Sheppard vs. Maxwell, 346 F.2d 707, (6th Cir. 1965) reversed on other grounds 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d. 600 (1966), the Sixth Circuit found there are some circumstances in which expert testimony must be accepted if formally uncontradicted where it concerns or touches upon matters on which no jury can exercise independent judgment because it has no knowledge or experience on which it can exercise such independent judgment.

This was precisely the case in this action where the jury had no knowledge or

experience in complex economic theory including but not limited to the sophisticated mathematical calculations by which the total amount of future wage losses are reduced to present value. The only testimony introduced into evidence on this question was provided by Dr. Anthony Gamboa, who was imminently qualified to render his opinion and was admitted as a qualified expert. In fact, evidence of the present value of such wage losses could not be admitted into evidence without the aid of expert testimony for this very reason. His testimony therefore constituted controlling evidence on which the jury's conclusion should have been based and it should not have been permitted to be disregarded. Failure of the Sixth Circuit to recognize and apply this principle violates its own precedent.

For all these reasons, the decision below should be reviewed by this Court and reversed.

C. WHETHER THE CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT DECISIONS.

Contrary to Respondent's position in its Brief, the decisions of the Supreme Court do not permit the jury to determine

on its own sophisticated matters such as reduction to present value computations once it has decided that a party is entitled to an award. In this area the jury must, of course, give recourse to the only technical expertise available to it, which in this case was solely testimony of Dr. Anthony Gamboa. The Defendants took the risk of not producing expert testimony with which to justify its position that no future wage loss should be awarded and lost their gamble. The jury decided to award Plaintiff lost wages as evidenced by its jury verdict in which it arbitrarily selected the number $100,000.00 to satisfy its decision that she was entitled to such an award. However, this figure does not relate to any testimony by the only expert to provide any technical assistance to the jury which assistance was required in order for such evidence to be introduced in the first place.

The Supreme Court in no decision has held that the jury is free to speculate outside the expert testimony on a matter in which they could not possibly have the expertise necessary to make the required calculation in such a sophisticated matter.

This Court has addressed the nature and scope of an expert's qualifications in Daubert vs. Merell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) in which the Court set forth the standards for evaluating the methods and procedures on which expert opinions are based and whether such opinions can be applied to the facts in issue. Having concluded that the expert is in fact testifying to opinions which are based upon data which is reliable and that the testimony of the expert is based on credible research, the Court has never held that such testimony can then be disregarded by a jury once it decides to award damages based upon factors which can only be interpreted and computed by such an expert.

In Quock Ting vs. United States, 140 U.S. 417, 11 S.Ct. 733 and 35 L.Ed. 501 (1891), the Court made it clear that as a general rule positive testimony as to a particular fact uncontradicted by anyone should control the decision of the Court. [See Quock Ting, supra 140 U.S. 417, 420, 11 S.Ct. 733, 734, 35 L.Ed. 501 (1891).] This Court, to Petitioner's knowledge, has never allowed the jury to speculate as to a result which only expert testimony could justify. Therefore the

opinion below is due to be reversed.

V. CONCLUSION

It is clear that as a result of her life threatening injuries caused by Defendants, Tina Leap suffered a devastating reduction in her quality of life, which affects everything she does, including but not limited to, whatever limited vocational opportunity she may have and which necessitates almost daily tutoring and other assistance. Notwithstanding the fact that Tina may complete her college degree, she will never be capable of functioning at the same level of quality and endurance as before this terrible accident.

Tina Leap relied on the principle that unimpeached, uncontradicted evidence from an expert witness on a complex matter such as reduction of her future wage loss which could not have even been introduced into evidence before the jury without such testimony would, in fact, be the basis on which the jury would make its decision. Tina was unfairly deprived of the consistent, predictable administration of justice when the panel violated the Doctrine of Stare Decisis in its decision and when the Panel affirmed

the lower court's erroneous determination.

While the jury has a sovereign right to weigh the evidence and reach a verdict, the Court has a concomitant responsibility to reject that verdict if it is not supported by the evidence. These two responsibilities are co-extensive under the Seventh Amendment to the Constitution.

If the evidence clearly points to a single conclusion which is the only reasonable conclusion and the jury fails to so find, the Trial Court must protect the judicial process as the lower court should have done here, by granting an appropriate remedy, which in this case would have been either additur under Tennessee Law or a new trial. Similarly the Sixth Circuit decision erred by failing to reverse the District Court and this case cries out for relief before this Court which is Plaintiff's last, best hope of achieving just compensation for her irretrievable losses.

For these reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MASTERS, MULLINS & ARRINGTON

By:/s/Richard L. Masters
Richard L. Masters
Earl C. Mullins, Jr.

1012 S. Fourth Street
Louisville, KY 40203
(502) 582-2900